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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner

v.

UNITED STATES DEPARTMENT OF THE TREASURY,
OFFICE OF CHIEF COUNSEL, and
FEDERAL LABOR RELATIONS AUTHORITY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

In *United States* v. *Fausto*, 108 S. Ct. 668 (1988), this Court held that certain "excepted service" federal employees, who have no judicial remedy under Chapters 43 and 75 of the Civil Service Reform Act (5 U.S.C. 4303, 7513), may not circumvent the CSRA's scheme and obtain direct judicial review of adverse personnel actions in the Claims Court under the Tucker Act (28 U.S.C. 1491). The question presented here is whether union-represented excepted service employees may challenge serious discipline through the negotiated grievance-arbitration procedures of Chapter 71 of the Civil Service Reform Act (5 U.S.C. 7101 *et seq.*), whose plain language includes such grievances within its coverage.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Treasury Employees Union petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit in this case.

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 1a-12a) and its opinion denying rehearing (*id.* at 13a-15a) are reported at 873 F.2d 1467. The opinion of the Federal Labor Relations Authority (Pet. App. 17a-35a) is reported at 30 F.L.R.A. 656.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1989, and timely petitions for rehearing with suggestions for rehearing en banc were denied on July 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in Pet. App. 36a-53a, *infra*.

STATEMENT

1. *Introduction*

This case concerns the rights of a substantial number of union-represented federal employees to challenge serious discipline, including dismissal, through the negotiated grievance-arbitration procedure of the Federal Service Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978), 5 U.S.C. 7101 *et seq.* It arose out of a negotiability dispute between petitioner, the National Treasury Employees Union (NTEU), and the Office of Chief Counsel, the Internal Revenue Service (IRS). IRS objected to an NTEU proposal which provided that all employees in the Union's bargaining unit —including employees who hold positions in the "excepted service" and who are not "preference eligible"—would be covered by the disciplinary article of the contract. Pet. App. 4a, 17a.[1]

The court below reversed the ruling of the Federal Labor Relations Authority that NTEU's proposal was a

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[1] Pursuant to statute and government-wide regulations, all civil service employees, except high level non-political appointees, occupy positions in the competitive service or the excepted service, depending upon the method by which they gained entry to the civil service. *See United States* v. *Fausto*, 108 S.Ct. 668, 670 n.1 (1988); *National Treasury Employees Union* v. *Horner*, 854 F.2d 490 (D.C. Cir. 1988). "Preference eligible" employees are generally veterans or their close relatives. 5 U.S.C. 2108.

proper subject of bargaining, finding the issue "substantially affected—if not controlled—" by this Court's decision in *United States* v. *Fausto*, 108 S.Ct. 668 (1988). Pet. App. 5a. The panel's decision bars future negotiations aimed at securing adverse action rights for these employees, and also, in effect, invalidates numerous existing contract grievance articles covering thousands of such employees nationwide.

2. *The Statutory Scheme*

In the Civil Service Reform Act of 1978 (hereinafter "the CSRA"), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.*, Congress " 'comprehensively overhauled the civil service system', creating an elaborate 'new framework for evaluating adverse personnel actions against federal employees'." [2] The CSRA contains four separate chapters that establish procedures through which federal employees may challenge adverse personnel actions. In *Fausto*, this Court discussed three of those chapters (Chapters 23, 43, and 75) (*see* 108 S.Ct. at 672-673). Fausto did not, however, address Chapter 71, the CSRA section at issue in this case, which provides a scheme of separate remedies for union-represented employees.

To briefly recapitulate, Chapters 23, 43 and 75 of the CSRA apply to both union-represented federal employees and those who are not so represented. As this Court described in *Fausto* (108 S.Ct. at 672), each of these Chapters contains a definitional provision, which explicitly allocates particular procedural rights among the categories of federal employees it was intended to cover.

Thus, Chapter 23 covers employees who seek or occupy positions in both the competitive and the excepted service (unless the excepted service position is of a confidential or policy-making nature) (5 U.S.C. 2302(a)(2)

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[2] *Fausto*, 108 S. Ct. at 671, quoting *Lindahl* v. *OPM*, 470 U.S. 768, 773-774 (1985).

(B)), and prohibits agencies from engaging in "prohibited personnel practices" (*id.* at 2302), which violate "merit system principles" (*id.* at 2301).[3] Chapter 43 covers competitive service employees, preference eligible employees, and, in some circumstances, excepted service employees; it governs personnel actions based upon unacceptable performance (as opposed to misconduct).[4] Finally, Chapter 75 of the CSRA—which covers only competitive service employees and those who are preference eligible (5 U.S.C. 7511(a)(1))—establishes procedures for challenging adverse actions taken against employees to promote "the efficiency of the service," including actions based upon misconduct.[5]

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[3] Prohibited personnel practices include, among other things, unlawful discrimination and reprisals against whistleblowers. 5 U.S.C. 2302. Upon the filing of a charge by an affected employee, the Office of the Special Counsel of the Merit Systems Protection Board (MSPB) will investigate, anl may seek remedial action from the full Board. 5 U.S.C. 1206. If the prohibited personnel practice concerns a reprisal against a whistleblower, the employee has an individual right to ask the MSPB for corrective action in accordance with 5 U.S.C. 1221, a provision recently added by the Whistleblower Protection Act of 1989, Pub. L. 101-12, 103 Stat. 16.

[4] Chapter 43 defines "employee" as "an individual employed in or under an agency," with enumerated exclusions not revelant here. 5 U.S.C. 4301(2). It grants all covered employees certain procedural protections when an agency proposes to remove or demote them for unacceptable performance (5 U.S.C. 4303(a), (b), (c), (d)), but only competitive service employees and "preference eligibles" may appeal a performance-based removal or demotion to the MSPB in accordance with 5 U.S.C. 7701. 5 U.S.C. 4303(e). Thereafter, these aggrieved employees (but not the agency) may seek review of the MSPB's decision in the court of appeals for the Federal Circuit. 5 U.S.C. 7703(a)(1).

[5] Subchapter I of Chapter 75, governing minor adverse actions (suspensions for 14 days or less), covers only competitive service employees who have completed their probationary periods (5 U.S.C. 7501(1)), granting them certain procedural protections, but no appeal to the MSPB or to court. 5 U.S.C. 7503. Subchapter II, which governs major adverse actions (removals, suspensions over 14 days, reductions in grade or pay, and furloughs), covers both

Chapter 71 of the CSRA (5 U.S.C. 7101, *et seq.*), the section at issue in this case, is the labor-management relations chapter. Among other things, Chapter 71 requires agencies and unions to negotiate special contractual grievance procedures, culminating in binding arbitration, for employees who are union-represented. 5 U.S.C. 7121(a),(b); *see Cornelius* v. *Nutt*, 472 U.S. 648, 651-652 (1985). It defines "employee" as "an individual . . . employed in an agency" or "whose employment in an agency has ceased because of [an] unfair labor practice. . . ." 5 U.S.C. 7103(a)(2). Excluded from this definition are aliens and non-citizens, members of the uniformed services, supervisors or management officials, foreign service officers, and employees who participate in illegal strikes. *Id.* Chapter 71 does not exclude any other categories of employees from its coverage.

Under Chapter 71, "grievances" are defined, in pertinent part, as "any complaint . . . by any employee [or labor organization] concerning any matter relating to the employment of the employee" or concerning a violation of the collective bargaining agreement or "any law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7103(a)(9)(A), (B) and (C). Only five specific subjects are excluded from the coverage of the grievance arbitration procedure, none of which are pertinent to the present case. 5 U.S.C. 7121(c).

In accordance with 5 U.S.C. 7121(a), the contractual grievance procedures are the "exclusive" procedures that union-represented employees may use for grievances that fall within their coverage, except for the grievances that are set forth in sections 7121(d) and (e). In particular, under Section 7121(e)(1), a union-represented employee may elect to forgo the negotiated procedure and pursue

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competitive service employees and preference eligibles who have completed their probationary periods (5 U.S.C. 7511(a)(1)), granting them certain procedural protections (5 U.S.C. 7513(b)), as well as the right to appeal major adverse actions to the MSPB and ultimately the Federal Circuit. 5 U.S.C. 7513(d); 7701(a); 7703.

review before the MSPB and the Federal Circuit in matters covered by Chapter 43 or Subchapter II of Chapter 75 (performance based demotions or removals and major adverse actions against competitive service employees and preference eligibles). *See* notes 4 & 5, *supra*. If such employees elect the negotiated procedure, on the other hand, the arbitrator is required to apply the same substantive standards that the MSPB would apply, and his decision is reviewable by the Federal Circuit on appeal by the employee in the same manner that the MSPB's decision would be. 5 U.S.C. 7121(e)(2); *see Cornelius*, 472 U.S. at 652.

All other arbitral awards (those that do not concern matters covered by Chapter 43 or Subchapter II of Chapter 75) are appealable by either an agency or the union, but not the employee, by filing exceptions with the FLRA. 5 U.S.C. 7122(a); *see Local 1600, AFGE and the Naval Ordnance Station, Indian Head, Maryland*, 13 F.L.R.A. 345 (1983). There is no judicial review of FLRA decisions on exceptions to arbitral awards unless the award involves an unfair labor practice. 5 U.S.C. 7123(a)(1).

3. *Decisions Below*

a. Petitioner, the National Treasury Employees Union, represents employees in both excepted service and competitive service positions in the Chief Counsel's office of IRS. Pet. App. 4a. During term negotiations with IRS, the Union proposed, and IRS accepted, a standard contract article that would apply the adverse action provisions of the contract to all non-probationary employees. *Id.* at 18a. However, the Treasury Department, upon review of the agreement by the agency head (5 U.S.C. 7114(c)(1)), rejected the article, contending that it would be "inconsistent with Federal law" (*id.* at 7117(a)(1)) to permit excepted service employees who are not preference eligible to arbitrate adverse actions under the contract, because chapters 43 and 75 do not bestow upon

these employees the right to MSPB/Federal Circuit review of illegal adverse actions. *Id.* at 4a; *see supra*, notes 4 & 5.

b. NTEU filed a negotiability appeal with the FLRA in accordance with 5 U.S.C. 7117(c). The FLRA ruled the Union's proposal negotiable in reliance upon its earlier decision in *National Treasury Employees Union and Department of Health and Human Services, Region V*, 25 F.L.R.A. 1110 (1987), *rev'd sub nom. United States Department of Health and Human Services* v. *FLRA*, 858 F.2d 1278 (7th Cir. 1988). Pet. App. 18a-19a.

In *NTEU and HHS*, the FLRA relied upon the plain language of the Statute in holding that excepted service employees can grieve serious discipline. The Authority found it particularly significant that Congress had not excluded non-preference eligible excepted service employees from the definition of "employee" under Chapter 71, although it had excluded other categories of workers. 25 F.L.R.A. at 1114. Further, Congress did not exclude grievances concerning serious discipline of excepted service employees from the negotiated procedure, although it did exempt other specified matters from that procedure. *Id.*; *see* 5 U.S.C. 7121(c). Finally, there was nothing in the legislative history of the Statute to show Congress intended to exclude excepted service employees from obtaining the benefits of negotiated procedures; on the contrary, "the pertinent history of the Statute emphasizes that the permissible reach of the negotiated grievance procedure was to be broad." *Id.* at 1115, citing H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978).

The fact that Congress had not afforded excepted service employees unfettered access to MSPB appeal rights under Chapters 43 and 75 (*see supra* at notes 4 & 5) did not establish that Congress intended to preclude agencies and unions from negoitating procedural rights for them under Chapter 71. "Unlike the situation involv-

ing probationary employees," the FLRA explained, "there is nothing that can be construed as an affirmative preservation of a unilateral management prerogative by Congress or as indicating any explicit congressional limitation on the extension of appeal rights to these employees through the collective bargaining process." 25 F.L.R.A. at 1117.

c. On petition for review by IRS, the court of appeals reversed, agreeing with a recent decision of the Seventh Circuit which had reversed the FLRA's ruling in *HHS*.[6] The lower court dismissed the import of the definitional sections of Chapter 71 in a footnote (Pet. App. 10a, n.6), and found instead that the question whether excepted service employees can obtain arbitral review of adverse personnel actions "is substantially affected—if not controlled" by this Court's decision in *United States* v. *Fausto*. *Id.* at 5a. In particular, the court below believed that the Union's proposal would upset two of the structural elements of the CSRA that this Court discussed in *Fausto*—the primary role that the MSPB and the Federal Circuit were assigned to play in deciding adverse personnel actions, and the "preference" the CSRA exhibits for competitive service employees and preference eligibles. *Id.* at 5a-6a.

The court's interpretation of the Congressional intent underlying Sections 7121(e)(1) and 7121(f) of the Statute was pivotal to its conclusions. *See* Pet. App. 6a-7a. Those provisions, as explained *supra*, at 6, require arbitrators to apply the same standards the MSPB applies when deciding matters that are also appealable to the MSPB under Chapters 43 and 75, and afford the Federal Circuit exclusive jurisdiction over appeals from such decisions. The court opined that the provisions were "an unusual and sophisticated device" which it thought Congress had

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[6] Pet. App. 5a, citing *Department of HHS* v. *FLRA*, 858 F.2d 1278 (7th Cir. 1988).

adopted "to ensure uniformity and MSPB primacy." Pet. App. 6a-7a. It also believed the provisions showed that Congress did not want union-represented employees to obtain protections from removal, demotion, discipline or discharge through collective bargaining that were not available to non-union employees under Chapters 43 and 75. *Id.* at 7a.

The court observed that because the grievances of excepted service employees are not appealable to the MSPB under Chapters 43 or 75, arbitrators would not be statutorily required to apply MSPB standards to such grievances, and the Federal Circuit would not review the arbitral decisions. Pet. App. 7a-8a. The court believed that the absence of these statutory requirements would "invert" the Act's preference for competitive service employees and disrupt uniformity, because arbitrators might apply more favorable standards to excepted service employees than the MSPB does to competitive service employees, and because the FLRA applies a more deferential standard of review of arbitral decisions than does the Federal Circuit. *Id.* It found this result inconsistent with the policies this Court discussed in *Fausto*, and therefore reversed the FLRA's decision.[7]

In its initial decision, as it later acknowledged when it denied rehearing, the court made several related errors of statutory construction concerning the review provisions

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[7] The lower court also believed that affirming the FLRA's decision would interfere with the discretion Congress gave OPM to grant Chapter 75 rights to excepted service employees who are not in confidential or policy-making positions (*see* 5 U.S.C. 7511(c)), because, it predicted, OPM would "feel obliged" to do so, in order to ensure uniformity. Pet. App. 10a-11a. Further, the court noted that OPM does not have statutory authority to extend Chapter 43 rights to excepted service employees in performance-based adverse actions; OPM could not, therefore, prevent union-represented excepted service employees from negotiating greater protection from such actions than their counterparts who were not so represented. *Id.* at 11a-12a.

that would be available to excepted service employees if the Union's proposal were adopted. *See* Pet. App. 8a-10a. All of these errors related to its belief that the proposal would permit excepted service employees to have "three layers of review of agency action (arbitration—FLRA—court of appeals) rather than the two envisioned by Congress for the competitive service and veterans (MSPB—Federal Circuit or arbitration—Federal Circuit)." *Id.* at 9a-10a.

In a statement denying rehearing, the panel conceded its errors, and acknowledged that FLRA decisions on exceptions from arbitral awards involving excepted service employees would not be reviewable at all in the courts of appeals. Pet. App. 14a. The court nonetheless denied rehearing, concluding that this fact further undermined the proposal's negotiability, because it meant that the Federal Circuit could not supervise adverse action cases involving excepted service employees indirectly, through the regional courts of appeals. *Id.* at 14a-15a.

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an issue of obvious and considerable practical importance to federal employees, their unions, and the federal government. The decision divests a significant number of federal employees of crucial job protections, misinterprets the Civil Service Reform Act, and misapplies this Court's ruling in *United States* v. *Fausto*. This Court's review is necessary to resolve the tension the lower court perceived between the ruling in *Fausto* and the plain language of Chapter 71 of the CSRA, and to restore to the thousands of union-represented federal employees in the excepted service the crucial due process rights the lower court took away.

1. The decision of the court of appeals is of immediate and widespread importance to large numbers of tenured federal employees who have now been stripped of important contractual safeguards against unjust dismissal.

At the present time, several hundred thousand federal workers occupy excepted service positions.[8] While the number of such employees who are covered by collective bargaining agreements is unknown, on the whole, 62% of the federal workforce is union represented.[9] Until recently, and without objection by the government, negotiated procedures for grieving and arbitrating serious adverse actions have been available to, and used by, employees in both the excepted and competitive services, without regard to their preference eligible status.

The decision of the court below upsets this settled practice, disrupts existing collective bargaining arrangements, and condemns all excepted service employees who are not preference eligibles—including those who have worked for the federal government for many years—to the status of permanent probationary employees. Under the court's decision, a union may no longer invoke arbitration on behalf of these employees to secure impartial review and win reversal of improper discipline or dismissal. Without access to that procedure, the only option for excepted service employees who face the loss of their jobs is pursuit of internal agency appeals procedures (where available)—precisely the kind of procedures Congress intended negotiated ones to supersede entirely when it enacted Chapter 71.[10]

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[8] As of 1986, the government employed more than 300,000 excepted service employees. Petition for a Writ of Certiorari, United States of America v. Fausto, No. 86-595, at 9. That number has since grown; figures published in January, 1989 by the Office of Personnel Management indicate that as of September 1988, well over 450,000 federal workers had been classified as excepted service employees. United States Office of Personnel Management, *Federal Civilian Workforce Statistics: Employment and Trends as of January 1989*, at 84 (1989).

[9] Office of Personnel Management, *Union Recognition in the Federal Government* (Jan. 1989).

[10] *See* H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978), reprinted in *Legislative History of the Federal Service Labor-Management Relations Act of 1978*, Comm. Print 96-7, 96th Cong., 1st Sess. (Nov. 1979) (hereinafter "Leg. Hist.") at 825 (noting

As this Court has observed, one of the "major purposes" of the CSRA was to "strengthen the position of federal unions and to make the collective bargaining process a more effective instrument of the public interest." *Cornelius* v. *Nutt*, 472 U.S. 648, 663 (1985); *see also* 5 U.S.C. 7101(a) (finding that collective bargaining in the civil service is in the public interest). The lower court's decision, however, presents an obvious threat to the strength and effectiveness of unions that represent excepted service employees, by rendering them essentially impotent to guarantee basic procedural fairness to the employees they represent. In addition, the court's decision undermines the role of collective bargaining and the negotiated grievance procedure as means of settling the most important sort of personnel disputes for a significant percentage of the federal workforce.

2. The plain language of Chapter 71 of the CSRA contemplates that excepted service employees can challenge serious discipline through the negotiated grievance-arbitration procedure. The statutory phrase "grievance" plainly encompasses such challenges (5 U.S.C. 7103(a)(9)), and excepted service employees are included in the definition of "employee" contained in Chapter 71 unless they are supervisors, or fall within other limited categories. 5 U.S.C. 7103(a)(2).

The court of appeals dismissed the plain language of Chapter 71 in a footnote, stating that "reference to the broad definitional provisions of the statute" could not resolve the dispute before it. Pet. App. 10a, n.6. However, in *Fausto*, this Court carefully examined the definitional sections of each chapter of the CSRA, viewing them as both the *key* indicator of which rights Congress intended each category of federal employee to exercise, and

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that under the Statute "an employee covered by a collective bargaining agreement must follow the negotiated grievance procedure rather than the agency procedures available to other employees not covered by an agreement").

as the touchstone of its analysis of the statutory structure. 108 S.Ct. at 672-73. In concluding that Congress had expressed a deliberate intent to preclude non-preference eligible excepted service employees from obtaining direct judicial review of adverse personnel actions, the Court relied upon "the comprehensive nature of the CSRA, the attention it gives throughout to the rights of nonpreference excepted service employees, and the fact that it does not include them in provisions for administrative and judicial review contained in Chapter 75." 108 S.Ct. at 673.

Applied to this case, *Fausto*'s rationale strongly suggests that a Congress so attuned to distinctions between excepted service employees, competitive service employees, and preference eligibles throughout the CSRA, would have explicitly excluded excepted service employees from Chapter 71 had it intended them to be so excluded. *Cf.* 108 S.Ct. at 673-674. This is all the more true here because, as noted, Congress also took pains in Chapter 71 itself to explicitly carve out those subjects that would not be subject to the negotiated procedure; it did not include the grievances of excepted service employees among them. *See* 5 U.S.C. 7121(c).

In fact, it is hardly surprising that Congress chose not to exclude the grievances of excepted service employees from Chapter 71. The legislative history of the Statute reveals no policy justification for reserving to agencies the unlimited power to terminate excepted service employees without affording them any due process protections. Such employees are, after all, career federal workers and not probationary employees.[11]

Indeed, Congress explicitly authorized OPM to extend adverse action rights to employees in the excepted service.

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[11] *Cf. Department of Justice* v. *FLRA*, 709 F.2d 724, 729 (D.C. Cir. 1983) (concluding that Congress had unequivocally expressed its intent to guarantee agencies an unfettered right to summarily terminate probationary employees).

5 U.S.C. 7511(c). Further, in testifying on this measure before the House, the then-chairman of the Civil Service Commission urged that extending rights of appeal to excepted service employees was justified because such employees are "careerists within their agencies," because "equity and fairness" dictated that "all employees with career expectations should be accorded equal rights," and because the rights of these employees should not be "dependent upon an administrative determination that a competitive examination can or cannot be administered." [12]

Moreover, the lower court's interpretation of Sections 7121(e) and (f) of the Statute—the cornerstone of its analysis—was entirely faulty. Nothing in the Statute's language or history suggests, as the lower court believed (Pet. App. 6a-7a), that Congress required arbitrators to apply MSPB standards and centralized judicial review in the Federal Circuit in order to prevent union-represented employees from obtaining protections from adverse actions that are not available to those not so represented. Rather, as this Court explained in *Cornelius* v. *Nutt*, Congress imposed these requirements to avoid forum shopping *among union-represented employees*, who can elect either MSPB or arbitral review, and to insure uniformity of results within that category of workers. 472 U.S. at 661. In fact, that decision expressly confirms that union-represented employees may obtain reversal of

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[12] *Civil Service Reform: Hearings on H.R. 11280 Before the Comm. on Post Office and Civil Service*, 95th Cong. 2d Sess. 30 (1978).

There is strong indication in the legislative history of the Act that Congress expected OPM to extend all excepted service employees appeal rights under Chapter 75 so long as they were not in "confidential" or "policy making" positions. *See* S. Rep. 969, 95th Cong. 2d Sess. 48 (1978) (observing that "positions excepted from the competitive service will not automatically be exempted from the procedures governing adverse actions . . . a further determination must be made that a position meets the confidential or policy-making criteria established by [Section 7511]").

adverse actions on grounds not available to others—for example, the agency's failure to follow bargained-for procedures in effecting discipline. *Id.* at 659, 663.

Indeed, this key premise of the lower court's decision (Pet. App. 7a, 11a-12a)—that Congress intended to neutralize all distinctions in adverse action cases between the rights of union-represented employees and the rights of employees not so represented—conflicts with both the structure of the Statute and its purposes. When Congress created the streamlined CSRA dispute resolution procedures to replace the formerly "haphazard arrangements for administrative and judicial review of adverse actions," [13] the negotiated grievance procedure was a central element of its comprehensive plan. It intended the negotiated grievance procedure (available, of course, only to union-represented employees) to be "virtually all-inclusive" [14] and to be the "one clear avenue" for unionized employees to present their work-related complaints.[15]

Congress plainly contemplated that union-represented employees would reap an advantage from this scheme, because it authorized them to grieve *and* arbitrate a multitude of complaints for which those who are not so represented have no right of redress outside the agency.[16] In

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[13] *United States* v. *Fausto*, 108 S.Ct. at 668.

[14] H.R. Rep. No. 1403, 95th Cong. 2d Sess. 40 (1978), reprinted in Leg. Hist. at 686; *see also Cornelius v. Nutt*, 472 U.S. at 664 (describing "broad" definition of "grievance" under the statute).

[15] President's Reorganization Project, *Final Staff Report*, reprinted in Leg. Hist. at 1449, 1472. The recommendations of the President's Project were adopted by the Senate and became the model for the CSRA. S. Rep. No. 969, *supra*, at 1, reprinted in Leg. Hist. at 743.

[16] For example, union-represented employees can file grievances challenging minor discipline, while those who are not so represented have no right to third party review of such claims. 5 U.S.C. 7503. They can also challenge failures to promote, inequitable re-

fact, union-represented employees can arbitrate *any* complaint that falls within the broadly defined grievance procedure, while others can seek third party review only pursuant to a specific statutory provision.[17]

3. The lower court erroneously perceived an irreconcilable conflict between the rights which Chapter 71 grants excepted service employees and this Court's decision in *Fausto*.[18] However, the two structural elements of the CSRA that this Court discussed in *Fausto* do not—as the lower court believed—negate either the plain language of Chapter 71, or Congressional intent to provide for expansive coverage of union-represented employees' complaints under the negotiated procedure.

First, the Union's proposal simply does not "invert the Act's preference for [competitive service employees]." Pet. App. 7a.[19] Excepted service employees would not, as in *Fausto*, obtain access to a remedial forum unavailable to similarly situated employees in the competitive service (those who are union-represented). In fact, union-

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assignments, and any other personnel action covered under the collective bargaining agreement. There is no parallel statutory procedure for employees who are not union-represented. *See Carducci* v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983).

[17] *Cf. Bureau of Alcohol, Tobacco, and Firearms* v. *FLRA*, 464 U.S. 89, 107 n.17 (1983) (observing that unions may bargain with agencies to require them to pay travel expenses and per diem allowances of union negotiators, even though agencies are not required by statute to make such payments).

[18] *See also Department of HHS* v. *FLRA*, 858 F.2d 1278 (7th Cir. 1988).

[19] In *Fausto* the excepted service employee sought the right to challenge illegal discipline directly in court under the Tucker Act. This Court concluded that permitting excepted service employees a direct judicial forum would "invert" the CSRA's preference for competitive service employees, who, in fact, have no right at all to

represented excepted service employees would only have access to one forum to challenge serious discipline, while union-represented competitive service employees would have the option to choose either one of two forums, the grievance procedure or the MSPB.[20]

Second, even where a union-represented competitive service employee uses the arbitral forum, or when a non-represented competitive service employee seks relief before the MSPB, the subsequent review provisions remain more advantageous to competitive service employees, because in their cases only the employee, and not the employing agency, has a right to seek review in the Federal Circuit of an unfavorable decision by the arbitrator or the MSPB. 5 U.S.C. § 7703(a)(1); *see supra* at notes 4 & 5.[21] However, when an excepted service employee prevails in arbitration, the agency has an absolute right to file exceptions with the FLRA. 5 U.S.C. § 7122(a). At the same time, the excepted service employee who loses in arbitration cannot file exceptions on his own behalf; that decision is exclusively up to the union. *See Local 1600, AFGE and the Naval Ordnance Station, Indian Head, Maryland*, 13 F.L.R.A. 345 (1983).

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judicial review except as provided in Chapters 43 and 75. 108 S.Ct. at 674.

[20] A key drawback to being limited to the grievance procedure, from the employee's standpoint, is that the union controls the grievance procedure, makes the determination whether the case should be advanced to arbitration and determines whether exceptions should be filed with the FLRA. *See* 5 U.S.C. § 7121(b)(3)(C) and 7122(a). Under Chapters 43 and 75, the employee has the unfettered right to pursue an appeal to the MSPB and ultimate judicial review on his own behalf. *See* notes 4 & 5, *supra*.

[21] In "exceptional" circumstances, the Office of Personnel Management may intervene before the MSPB and then appeal its decision, if it demonstrates significant legal errors that will have a substantial impact upon a civil service law, rule, regulation or policy directive. 5 U.S.C. 7703(d); *Devine* v. *Sutermeister*, 724 F.2d 1558, 1566 (Fed. Cir. 1983).

Finally, the fact that the FLRA applies a standard of review that is more deferential to an arbitrator than the standard of review the Federal Circuit uses, provides no relative benefit to the excepted service employee, as the court below appeared to suggest. Pet. App. 8a.[22] In a case involving a competitive service employee, the agency never benefits from the fact that the Federal Circuit is less deferential to the arbitrator because, as noted, when a competitive service employee wins in arbitration, the agency generally has no right to seek review anyway. On the other hand, an excepted service employee who loses in arbitration is *disadvantaged* by the FLRA's greater deference to the arbitrator, as compared to his counterpart in the competitive service, because the FLRA will be granting its greater deference to an arbitral decision that is *adverse* to the excepted service employee.

The second *Fausto* structural element the lower court invoked in support of its decision is the "primacy" this Court concluded Congress intended to accord the decisions of the MSPB and the Federal Circuit in resolving disputes over adverse actions. Pet. App. 6a, 7a. While this Court had no occasion to discuss or reconcile the role of the FLRA in relation to the MSPB and the Federal Circuit in *Fausto*, it is clear that the lower court erred in making the policy of "primacy" its paramount consideration in considering the negotiability of the Union's proposal.

First, the lower court's conclusion that FLRA jurisdiction over adverse action issues interferes with the "primacy" of the MSPB and the Federal Circuit ignores

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[22] The Statute permits the FLRA to set aside arbitral awards on grounds similar to those applied by the courts in private sector labor-management relations, or because the award is contrary to law. 5 U.S.C. 7122(a). The Federal Circuit, on the other hand, may also review an arbitrator's award to determine whether substantial evidence supports his decision, and whether the decision is arbitrary and capricious. 5 U.S.C. 7703(c).

the significant distinction between "primacy" and "exclusivity." The MSPB and the Federal Circuit do not have exclusive jurisdiction over adverse personnel actions, and this Court certainly did not suggest their role was to be exclusive in *Fausto*, except insofar as the Federal Circuit was to be the exclusive locus of *judicial* review. Indeed, as part of the CSRA's scheme, Congress fully expected the FLRA to have an important, albeit, secondary role in resolving adverse personnel actions in a variety of contexts, without oversight by the Federal Circuit.

Thus, the FLRA plays a critical role as the unreviewable appellate authority for all disputes—like the disciplinary grievances of excepted service employees—that Congress believed did not warrant inclusion in the full blown, statutory, administrative, and judicial system of the MSPB and Federal Circuit. Accordingly, the FLRA reviews minor adverse action grievances that are not appealable to the MSPB under 5 U.S.C. § 7503. It also reviews major adverse actions arising under "other personnel systems" where no form of judicial review is provided. *See* 5 U.S.C. § 7121(e) (stating that matters "similar" to those that can be raised before the MSPB "which arise under other personnel systems . . . may . . . be raised under the appellate procedures, *if any*, applicable to those matters, or under the negotiated grievance procedure") (emphasis added). In these cases, the general grant of jurisdiction set forth in Section 7122(a) enables the FLRA to decide major adverse action and other issues, which may also come before the MSPB, without being subject to the oversight of the Federal Circuit; indeed, the Federal Circuit has so held. *See Nieuwdorp v. Library of Congress*, 872 F.2d 1000 (Fed. Cir. 1989).[23]

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[23] *See also, Moreno* v. *MSPB*, 728 F.2d 499 (Fed. Cir. 1984); *NTEU* v. *Cornelius*, 617 F.Supp. 365 (D.D.C. 1985) (unionized employee must challenge denial of within grade increase under

Furthermore, none of the policies underlying the grant of "primacy" to the MSPB and the Federal Circuit are offended by permitting excepted service employees to grieve and arbitrate serious discipline. In *Fausto*, this Court observed that Congress gave the MSPB and Federal Circuit primacy in order to permit the development "of a unitary and consistent Executive Branch position on matters involving personnel action," to avoid " 'an unnecessary layer of judicial review' in lower federal courts," and to " 'encourage more consistent judicial decisions'." 108 S.Ct. at 674, quoting S. Rep. 969, 95th Cong., 2d Sess. 52 (1978).

Obviously, permitting excepted service employees to grieve serious discipline would neither create an additional layer of judicial review nor interfere with consistent judicial decision making, since the judiciary has no role in the review process before the FLRA. Further, the FLRA's exclusive review of cases involving excepted service employees, like the Federal Circuit's in cases involving competitive service employees, would permit the Executive Branch to develop a "unitary and consistent" policy with regard to identifiable categories of employees. An agency office would know which law to apply to excepted service employees because, here, as in other cases in which its jurisdiction is exclusive, the FLRA alone would establish it. *Cf. Fausto*, 108 S.Ct. at 675 (observing that if excepted service employees could challenge adverse actions in claims court or district court "an agency would not know whether to follow the law of its geographical circuit or the conflicting law of the Federal Circuit").

In short, the tension the lower court perceived between the Union's proposal and this Court's ruling in *Fausto*, is illusory. *Fausto* provides no justification for the lower

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negotiated procedure with final appeal to FLRA, while non-unionized employee uses MSPB with appeal to Federal Circuit).

court's decision in this case, or for divesting union-represented excepted service employees of their longstanding right to grieve and arbitrate serious discipline.[24]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October, 1989

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[24] The court below also suggested that to permit excepted service employees to file grievances would create an "anomaly" because, it predicted, OPM would feel "obliged" to exercise its discretion under 5 U.S.C. 7511(c) to extend MSPB appeal rights to these employees in order to "prevent potential inconsistencies in personnel actions." Pet. App. 11a. Even assuming it is relevant, the panel's suggestion that OPM's hand would be "forced" is belied by the fact that up until recently, the rights of excepted service employees to file grievances challenging major adverse actions had never been doubted; nonetheless, OPM has apparently not seen fit to extend MSPB rights to them. That is doubtless due to the fact that, as we have argued (*supra* at 16-18), the rights of excepted service employees to pursue contractual remedies are significantly less effective if they do not also have MSPB appeal rights.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 6, 1989 Decided May 2, 1989

No. 88-1159

DEPARTMENT OF THE TREASURY,
OFFICE OF CHIEF COUNSEL,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor

Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority

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Peter R. Maier, Attorney, Department of Justice, with whom *John R. Bolton*, Assistant Attorney General, and *William Kanter*, Attorney, Department of Justice, were on the brief, for petitioner.

Robert J. Englehart, Attorney, Federal Labor Relations Authority, with whom *William E. Persina*, Acting Solicitor, and *Arthur A. Horowitz*, Associate Solicitor, Federal Labor Relations Authority, were on the brief, for respondent. *Ruth E. Peters*, Attorney, Federal Labor

Relations Authority, also entered an appearance for respondent.

Clinton D. Wolcott, with whom *Gregory O'Duden* and *Elaine Kaplan* were on the brief, for intervenor. *Lois G. Williams* also entered an appearance for intervenor.

Before: RUTH B. GINSBURG, SILBERMAN and BUCKLEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: This case raises the issue whether federal employees in the excepted service, who have no statutory right to appeal adverse personnel actions, may nevertheless require an agency to bargain over creation of a grievance arbitration procedure permitting a challenge to those personnel actions. The Treasury Department, contending that arbitration over such matters is inconsistent with federal law and thus nonnegotiable under Title VII of the Civil Service Reform Act ("CSRA"), petitions for review of a Federal Labor Relations Authority decision holding the contrary. We conclude that the legislative history and structure of the CSRA do show that Congress intended these excepted service employees to have no right to arbitral review, and therefore grant the petition for review.

I.

The CSRA divides civil service employees into three main classifications: senior executive service (whose status is not relevant to this case), competitive service, and excepted service. Generally speaking, employees in the competitive service, who must pass civil service exams, are granted an array of substantive and procedural protections not bestowed on excepted service employees—unless the latter are veterans, in which case they are referred to as "preference eligibles," 5 U.S.C.

§ 2108(3) (1982),[1] and treated for purposes of adverse actions similarly to those in the competitive service.[2] Excepted service employees gain admission into the federal service without the need to pass civil service exams (although many are highly skilled), and presumably for that reason, Congress thought it inappropriate to grant them certain statutory rights available to those in the competitive service, unless they were veterans. We shall refer to nonpreference eligible excepted service employees, whose status and rights are at issue in this case, as NEES employees.

Perhaps the most important protections enjoyed by the competitive service are those—set forth in chapters 43 and 75 of the Act—which buffer the prospect of discipline or discharge. Chapter 43 grants agencies authority to "reduce in grade or remove an employee for unacceptable performance," 5 U.S.C. § 4303(a) (1982 & Supp. V 1987), and chapter 75 permits the discipline of any employee for "such cause as will promote the efficiency of the service." *Id.* § 7513(a). In either case, however, a competitive service employee or a veteran in the excepted service may, as a matter of right, appeal such "adverse action" to the Merit System Protection Board, *id.* § 4303(e); *id.* § 7513(d), 7511(a), and, if dissatisfied with the MSPB's decision, appeal further to the United States Court of Appeals for the Federal Circuit. *Id.* § 7703(b)(1). This right to appeal adverse actions under either chapter is not granted to NEES employees, *id.* § 4303(e), § 7511(a), although Congress delegated to the Office of Personnel Management authority to grant any category of the excepted service the right to appeal

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[1] The statute also classifies certain close relatives of veterans as preference eligibles, but for convenience we will equate preference eligibles and veterans.

[2] By our use of "competitive service employees" throughout this opinion, we refer to both competitive service and preference eligible excepted service employees.

to the MSPB (and thereby to the Federal Circuit) adverse disciplinary actions under chapter 75 (but not adverse actions under chapter 43). *Id.* § 7511(c). OPM has not as yet chosen to exercise that authority with respect to the NEES employees involved here.

The National Treasury Employees Union represents both competitive service and excepted service employees in the Chief Counsel's Office of the IRS. The union sought a collective bargaining agreement, applying to both categories of employees, that would permit arbitration of adverse personnel action covered by chapters 43 and 75. The Treasury Department, upon review of the proposed agreement by the head of the agency, *see id.* § 7114(c)(1), rejected that part of the agreement that would give those arbitration rights to NEES employees because, Treasury maintained, to do so would be "inconsistent with Federal law." *Id.* § 7117(a)(1).

The union appealed Treasury's nonnegotiability determination to the FLRA under 5 U.S.C. § 7117(c), and the FLRA, disagreeing with Treasury, held the proposed contract negotiable. The government, in turn, has petitioned for review of the FLRA's decision here. The question before us is whether Congress permitted NEES employees to gain through collective bargaining, under one portion of the CSRA, adjudicatory appeal rights that were denied them under other parts of the Act. We are thus required to consider the functional interrelationship of various institutions under those statutes: arbitrators, the FLRA, the MSPB, OPM, the Federal Circuit, and the other courts of appeals. Although the FLRA is entitled to deference when interpreting its own organic legislation (the Labor-Management Relations Statute), that is not so when we are obliged to interpret other chapters of the CSRA. *NTEU v. FLRA*, 248 F.2d 1273, 1275 (D.C. Cir. 1988); *Department of Justice v. FLRA*, 709 F.2d 724, 729 n.21 (D.C. Cir. 1983).

II.

Treasury argues that the exclusion of NEES employees from MSPB review under both chapters 43 and 75 necessarily means that proposals for grievance arbitration procedures to review adverse personnel actions are nonnegotiable. The FLRA, on the other hand, contends it does not follow that merely by withholding MSPB review rights, Congress meant to exclude NEES employees from access to contractual grievance procedures that lead to arbitration of these issues. *NTEU and Dep't of Treasury*, 30 F.L.R.A. No. 81 (1987); *see NTEU and Dep't of HHS*, 25 F.L.R.A. 1110 (1987), *rev'd sub nom. Department of HHS v. FLRA*, 858 F.2d 1278 (7th Cir. 1988). We, like the Seventh Circuit in *Department of HHS*, agree with the Treasury Department that arbitral review of adverse personnel actions for NEES employees is inconsistent with the remedial scheme constructed by Congress in the CSRA.

We think, as did our sister circuit—that the issue is substantially affected—if not controlled—by the Supreme Court's recent decision in *United States v. Fausto*, 108 S. Ct. 668 (1988). There, the Court held that the CSRA precluded a suit for backpay in the United States Claims Court by an excepted service employee who had no right to review of an agency suspension under the CSRA. An inquiry into civil service remedies, according to *Fausto*, must proceed by "examining the purpose of the CSRA, the entirety of its text, and structure of review that it establishes." *Id.* at 671. This is so because the CSRA replaced an outdated and inefficient patchwork system with "an *integrated* scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 672 (emphasis added).

Fausto identified two interrelated structural elements of the CSRA which led to the Court's conclusion that

NEES employees could not seek a remedy under the Back Pay Act for allegedly unauthorized suspensions. First, the Court recognized that the CSRA establishes the MSPB as a primary body for resolving disputes over adverse personnel actions, and the Federal Circuit as the exclusive locus of judicial review of MSPB decisions. This scheme "enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action," and exclusive Federal Circuit review "[e]ncourages more consistent judicial decisions . . . ." *Id.* at 674 (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 52 (1978)). To allow NEES employees to litigate adverse actions in the Court of Claims under the Back Pay Act would have destroyed that consistency and uniformity.

Second, the Court acknowledged, as had we, that the CSRA generally grants a preferred position to competitive service and preference eligible employees relative to nonpreference eligible excepted service and probationary employees.[3] *Id.* at 674; *see Harrison v. Bowen*, 815 F.2d 1505, 1510 (D.C. Cir. 1987). The Court of Claims remedy sought by Fausto would have inverted the preferences by allowing judicial review for excepted service and probationary employees, where such review was unavailable for the preferred groups. *Fausto*, 108 S. Ct. at 674.

A similar analysis leads us to reject the FLRA's position here. Congress permitted competitive service employees covered by a collective bargaining agreement to choose, when challenging adverse action under chapters 43 and 75, either review through arbitration or the MSPB. 5 U.S.C. § 7121(e)(1) (1982). But, recognizing that the two procedures might lead to inconsistent treatment, Con-

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[3] Probationary employees are those in any of the three major classifications who must serve a probationary period before final appointment; while probationers, employees enjoy distinctly limited procedural protections and can be dismissed summarily.

gress adopted an unusual and sophisticated device to ensure uniformity and MSPB primacy. If an employee chooses arbitration, the arbitrator is governed by MSPB precedent and may not interpret a collective bargaining agreement to reach results that would not be countenanced by the MSPB under its interpretation of the statute. *Id.* § 7121(e)(2). That suggests that Congress did not wish competitive service employees represented by a union to achieve significant protections from removal, demotion, discipline, or discharge under chapters 43 and 75 not available to non-union competitive service employees. To further ensure uniformity, the statute provides that appeals from either the MSPB or the arbitrator that involve this class of cases must be taken only to the Federal Circuit. *Id.* § 7121(f), § 7703(b)(1) (1982 & Supp. V 1987).

Therein lie the defects in the union's proposal as it applies to NEES employees. If NEES employees could contest adverse personnel actions through arbitration, which they cannot appeal to the MSPB, arbitrators would not be statutorily bound to apply MSPB precedent to those proceedings, *see U.S. Soldiers and Airmen's Home and AFGE, Local 3090*, 11 F.L.R.A. 692 n.* (1983), and could treat NEES employees more favorably than competitive service employees, thereby inverting the Act's preference for the latter category of employees.[4] In this case, to be sure, the same collective bargaining agree-

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[4] The CSRA provides that the MSPB shall sustain an agency decision based on unacceptable performance if it is supported by substantial evidence, 5 U.S.C. § 7701(c)(1)(A) (1982), and shall uphold disciplinary action taken under chapter 75 if it is supported by a preponderance of the evidence. *Id.* § 7701(c)(1)(B). The statute also requires that any alleged flaw in the agency's procedures must constitute "harmful error" in order to justify reversal by the MSPB. *Id.* § 7701(c)(2)(A). But under the proposed grievance procedure, an arbitrator hearing a grievance of an NEES employee would be guided by the collective bargaining agreement rather than these statutory standards.

ment would cover both competitive service and NEES employees, so it might be thought that arbitrators would tend to apply the statutory standards to both categories. But arbitrators would not be so obliged by the CSRA. Moreover, consistent treatment of the two categories would seem less likely if NEES employees were represented—as we must contemplate—in a separate unit.

The uniformity problem is compounded, because normally arbitrators' decisions under the LMRS may be appealed to the FLRA; only matters under chapters 43 and 75 (applying to the competitive service and veterans) must be appealed to the Federal Circuit. Therefore, an arbitrator's determination as to the propriety of adverse personnel actions taken against an NEES employee could be appealed only to the FLRA, which must apply a very deferential standard of review on most issues, 5 U.S.C. § 7122(a) (1982 & Supp. V 1987), akin to that which governs judicial review of arbitration in the private sector. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (courts may not review merits of an arbitration award as long as it is based on interpretation and application of the collective bargaining agreement).[5] By contrast, the Federal Circuit is directed to set aside an arbitral award to a competitive service employee or veteran if, *inter alia*, it is unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1982 & Supp. V 1987); *Wade v. Department of Navy*, 829 F.2d 1106, 1108-10 (Fed. Cir. 1987).

The FLRA suggests an imaginative, if jerry-built approach to prevent an inverted preference for NEES

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[5] Section 7122 provides that the FLRA may take such action as it considers necessary if, upon review of an arbitral award, it finds the award is deficient—

(1) because it is contrary to law, rule, or regulation; or

(2) on other similar grounds to those applied by Federal courts in private sector labor-management relations.

5 U.S.C. § 7122(a) (1982).

employees and to achieve uniformity of review. It contends we could hold that the FLRA, when reviewing arbitrators' decisions dealing with NEES employees, must adhere to MSPB precedent as it applies to the competitive service. That proposal strikes us as a proposed amendment of the statute appropriately directed to Congress. Even were we to adopt it, there is of course no assurance, as the FLRA implicitly assumes, that all other circuits to which FLRA decisions may be appealed would follow our lead. And, if we were to accept the FLRA's suggestion, we would ignore another element of Congress' plan for uniformity: that these kinds of cases no matter where they were initially tried would ultimately be reviewed by the Federal Circuit. *See* S. REP. No. 969, 95th Cong., 2d Sess. 52 (1978); *Fausto*, 108 S. Ct. at 674. (Paradoxically, FLRA decisions may be appealed to all courts of appeal but the Federal Circuit). A regime whereby the other twelve courts of appeals (but not the Federal Circuit) apply Federal Circuit law in this class of cases seems quite at odds with congressional purpose. Congress originally allowed for review of an MSPB decision "in the Court of Claims or *a* United States court of appeals." *see* 5 U.S.C. § 7703(b)(1) (Supp. II 1978) (emphasis added), *amended by* 5 U.S.C. § 7703(b)(1) (1982), but subsequently amended the statute to limit review to the Federal Circuit, precisely to avoid the problems of varying decisions in the regional courts of appeals. *See* 5 U.S.C. § 7703(b)(1) (1982); H.R. REP. No. 312, 97th Cong., 1st Sess. 17 (1981) (creation of Federal Circuit ensures uniformity in "administration of law in the area[] of . . . merit system protection"; S. REP. No. 275, 97th Cong., 1st Sess. 3, 4 (1981) (same).

We also note that if the FLRA were affirmed, NEES cases would involve three layers of review of agency action (arbitration—FLRA—court of appeals) rather than the two envisioned by Congress for the competitive service and veterans (MSPB—Federal Circuit or arbitration

—Federal Circuit). That outcome seems plainly at odds with Congress' intent to streamline review of adverse personnel actions. *See Fausto*, 108 S. Ct. at 674.

We see, then, that the FLRA's interpretation of the statute runs the risk of inverting the preference granted to competitive service employees and veterans vis-a-vis NEES employees, and threatens MSPB primacy in developing administrative law governing adverse actions against federal employees—both considerations which underlay the Supreme Court's concern in *Fausto*. And the FLRA's suggestion to ameliorate these problems, even were we authorized to accept it, would undermine the Federal Circuit's role in the statutory scheme and introduce an added—and unwanted—level of review.[6]

The FLRA's statutory interpretation, moreover, creates other anomalies inconsistent with congressional purposes. Congress specifically delegated to OPM, not the FLRA, discretion to extend statutory appeal rights under chapter 75 to NEES employees. In other words, OPM, the Executive Branch's personnel management arm, was given the extraordinary authority to trigger MSPB and federal judicial review of Executive Branch disciplinary actions against NEES employees. Were we to accept the FLRA's position—thus allowing NEES employees covered

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[6] We also reject the FLRA's assertion, as we did in *Department of Justice v. FLRA*, 709 F.2d 724, 728-29 (D.C. Cir. 1983), that because Congress did not exclude excepted service employees from the broad definitions of "employee" and "grievance," *see* 5 U.S.C. §§ 7103(a)(2), 7103(a)(9) (1982), it must have intended to permit grieving of adverse actions. In *Department of Justice*, we held that probationary employees could not compel a federal agency to bargain over a grievance procedure addressing termination of probationers. Though the structure of the CSRA may bear somewhat differently on NEES employees than it does on probationers, we adhere to our view that "[d]etermination of negotiability issues cannot be resolved by mere reference to the broad definitional provisions in the statute." *Department of Justice*, 709 F.2d at 729 n.22.

by a collective bargaining agreement to gain these appeal rights through arbitration—OPM, in order to insure uniformity over the resolution of these issues, could well feel obliged to extend MSPB review to all NEES employees. By taking that action, which would oust the FLRA of jurisdiction, OPM could prevent potential inconsistencies in personnel actions—at least with respect to chapter 75—but only at the cost of surrendering the independence of its decision whether to extend MSPB and judicial review to this class of employees. The FLRA, it would appear, may in that way force OPM's hand, an outcome which seems inconsistent with the congressional delegation to OPM.[7]

Even if OPM did extend chapter 75 review procedures to NEES employees, it would lack the statutory authority to do so for chapter 43 personnel actions (based on unacceptable performance). This would mean unionized NEES employees could gain a substantial advantage over those not covered by collective bargaining agreements, because the former could gain review by an arbitrator of discipline or discharge for poor work performance, while the latter would have no such right of review by either an arbitrator or the MSPB. Generally, however, as we have noted, the statutory structure manifests a desire for equal substantive protections against discipline or dis-

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[7] Intervenor NTEU argues that Congress never meant for OPM to have complete discretion in this area, but only discretion to determine which excepted service employees held positions of confidential or policymaker character (and should thus be excluded from MSPB review). Although there is some legislative history indicating that Congress meant for OPM to perform the sorting function that intervenor suggests, we cannot read that legislative history to narrow drastically the broad grant of discretion given by the plain language (and the legislative history) of section 7511(c). *See* S. REP. No. 969, 95th Cong., 2d Sess. 49 (1978) (subsection 7511(c) "permits the Office of Personnel Management, *in its discretion*, to extend adverse action and appeal coverage to positions or groups of positions [in the excepted service]") (emphasis added).

charge for all federal employees in the same classification. *See, e.g.*, 5 U.S.C. § 7121(e), § 7121(f) (1982). We think it implausible, therefore, that Congress intended to permit such disparate treatment for unionized NEES employees on this particular matter.

That Congress envisioned the availability of grievance procedures for certain specialized personnel, notwithstanding the absence of a statutory right of appeal, does not alter our conclusion that arbitration is unavailable for NEES employees. Congress provided that matters relating to adverse personnel actions which arise under "*other personnel systems* . . . may, in the discretion of the aggrieved employees, be raised either under the appellate procedures, *if any*, applicable to those matters, or under the negotiated procedure, but not both." 5 U.S.C. § 7121(e)(1) (emphasis added). The inclusion of the words "if any" does show Congress contemplated that some of these employees, who fall under specialized personnel systems apart from the main civil service system, would negotiate for grievance procedures although they have no statutory right of appeal. *See* S. REP. NO. 969, 95th Cong., 2d Sess. 110 (1978) (discussing "other personnel systems . . . such as those provided in title 38," relating to veterans' benefits). The excepted service personnel involved in these cases, however, are covered by the main civil service system and not by the provision relating to specialized personnel systems; section 7121(e)(1) thus does not affect our analysis of the remedial structure set forth in title 5.

The CSRA establishes a comprehensive remedial framework governing the civil service. Congress carefully constructed a scheme that would ensure uniformity in personnel decisions and promote efficiency of administration. By authorizing an ancillary approach for NEES employees, the FLRA's position would undermine the structure of the CSRA. We thus grant the petition for review.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1159

DEPARTMENT OF THE TREASURY
OFFICE OF CHIEF COUNSEL,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor

Before: Ruth B. Ginsburg, Silberman and Buckley, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of respondent and intervenor it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Circuit Judge Silberman, joined by Circuit Judges Ruth B. Ginsburg and Buckley, is attached.

SILBERMAN, *Circuit Judge*, joined by RUTH B. GINSBURG, and BUCKLEY, *Circuit Judges*: Petitioner, the FLRA, correctly brings to our attention that we overlooked our earlier opinion in *Griffith v. FLRA*, 842 F.2d 487 (D.C. Cir. 1988), holding that the merits of arbitration awards appealed to the FLRA are not further reviewable in *any* federal court unless the arbitrators' decision (and the FLRA's affirmance) is challenged as unconstitutional or falls within the narrow bounds of the *Leedom v. Kyne*, 358 U.S. 184 (1958), exception to statutory provisions. That is so because section 7123(a) provides that:

> Any person aggrieved by any final order of the Authority *other than an order under*
>
> (1) Section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title

may institute an action for judicial review of the authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia. 5 U.S.C. § 7123(a) (1982) (emphasis added). *See Griffith*, 842 F.2d at 490-92.

This point, however, weakens rather than strengthens the FLRA's position in this case because it means the federal judiciary presumably would be powerless to ensure that the FLRA, in its review of arbitration awards involving adverse personnel actions taken against excepted service employees, followed the MSPB law that the FLRA conceded ought to apply. Indeed, in light of *Griffith* and the statutory language it interpreted, it is doubtful that we have the power to accept the FLRA's suggestion made at oral argument that, in this case, we hold it bound by MSPB law in reviewing arbitration awards dealing with adverse actions. In that regard,

we think the FLRA's counsel was obliged to acknowledge that difficulty and to cite to *Griffith*. We are disappointed that he did not do so.

The FLRA's interpretation would circumvent the congressional design that there be uniform standards governing employee appeals from adverse personnel actions, the class of employee and his union or nonunion status notwithstanding. Congress engineered this result in the CSRA by providing "no matter where [adverse personnel action cases] were initially tried, [they] would ultimately be reviewed by the Federal Circuit." Slip op. at 9. It hardly enhances the FLRA's position to point out that under its interpretation of the Act, its review of arbitration awards of adverse action against excepted service employees would be, for the most part, unreviewable by any court. That would ensure the loss of Federal Circuit supervision—directly or indirectly.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1159

DEPARTMENT OF THE TREASURY
OFFICE OF CHIEF COUNSEL,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

[Filed July 17, 1989]

The Suggestions For Rehearing *En Banc* of Respondent and Intervenor have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

30 FLRA No. 81

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-NG-1447

NATIONAL TREASURY EMPLOYEES UNION,
Union

and

DEPARTMENT OF TREASURY
OFFICE OF CHIEF COUNSEL,
Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. *Statement of the Case*

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The case presents issues concerning the negotiability of two provisions of a contract which were agreed to locally by the parties but disapproved during review of the agreement by the Agency head pursuant to section 7114(c) of the Statute. The provisions would permit non-preference eligible excepted service employees to appeal adverse actions under the parties' negotiated grievance procedure. We find that both provisions are within the duty to bargain.

II. *Background*

The disputed provisions in this case—Article 5, Employee Grievance Procedure and Article 6, Arbitration—were disapproved by the Agency head "to the extent these articles apply the grievance procedure and arbitration to those personnel actions involving excepted service employees and probationary employees, where pursuant to 5 U.S.C. 4303 and 5 U.S.C. 7511, such employees have no right of appeal to the Merit Systems Protection Board." *See* Memorandum of August 10, 1987, attached to the Union's Petition for Review. Articles 5 and 6, which are set forth in the Appendix to this decision, are intended to provide excepted service employees with certain appeal rights under the collective bargaining agreement. *See* Union Petition for Review at 2; Agency Statement of Position at 2. Nothing in the record indicates that the disputed provisions apply to probationary employees. Our decision addresses only the provisions' application to excepted service employees.

III. *Positions of the Parties*

The Agency contends that providing excepted service employees with access to grievance procedures is inconsistent with Federal law and Government-wide regulations. The Agency acknowledges that in *National Treasury Employees Union and Department of Health and Human Services, Region V, Chicago, Illinois*, 25 FLRA 1110 (1987), *petition for review filed sub nom. United States Department of Health and Human Services v. FLRA*, No. 87-1595 (7th Cir. April 13, 1987), the Authority found negotiable a provision which would permit excepted service employees to be included within negotiated grievance and arbitration procedures. The Agency requests that we reconsider that decision, and contends that Congress preempted agencies from granting through labor negotiations grievance procedure rights to non-veteran employees in the excepted service.

The Union also notes the Authority's decision in *NTEU and HHS*, 25 FLRA 1110, and states that the Authority held in that case that the grant of adverse action protections to excepted service employees was consistent with Congressional intent and within the duty to bargain. According to the Union, the Agency has not presented any new arguments which the Authority did not decide in the HHS case. The Union contends that its proposal is consistent with the Congressional scheme enacted in the Civil Service Reform Act and is within the duty to bargain.

IV. *Discussion*

Articles 5 and 6 involve grievance and arbitration procedures which would permit excepted service employees to grieve adverse actions taken against them. As noted by the parties, the articles are to the same effect as the proposal at issue in *NTEU and HHS*. In that case, the Authority found negotiable a proposal which would include excepted service employees within the coverage of the grievance, adverse action, and arbitration articles of the parties' negotiated agreement. The Authority considered the same arguments as those presented in this case, and found that Congress did not intend to exclude excepted service employees from coverage of negotiated grievance procedures. Nothing in the record in this case warrants a contrary conclusion as to Articles 5 and 6.

Consequently, for the reasons more fully set forth in *Department of Health and Human Services*, we find that Article 5 and Article 6 are within the duty to bargain.

V. *Order*

The Agency must rescind its disapproval of Article 5 and Article 6.*

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* In finding that Article 5 and Article 6 are within the duty to bargain, we make no judgment as to their merits.

Issued, Washington, D.C., December 30, 1987.

/s/ Jerry L. Calhoun,
JERRY L. CALHOUN,
Chairman

/s/ Jean McKee,
JEAN MCKEE,
Member

FEDERAL LABOR RELATIONS
AUTHORITY

APPENDIX

ARTICLE 5 EMPLOYEE GRIEVANCE PROCEDURE

Section 1: Objectives and Purposes

A. The Employer and the Union recognize and endorse the importance of bringing to light and adjusting problems promptly and; whenever possible, informally. For purposes of this Agreement, adjusting problems informally contemplates adjustments arrived at between an employee and a manager; an employee, a manager and a Union representative; or a manager and a Union representative.

B. The purpose of this article is to provide an orderly method for the processing and disposition of grievances brought by employees or by the Union on behalf of employees. This article does not apply to the filing of institutional grievances concerning the effect or interpretation, or a claim of breach of the provisions of this Agreement relating to the rights and benefits accruing to the Union as the exclusive representative of bargaining unit employees.

C. The Union agrees to submit virtually all contract-related matters to the negotiated grievance procedure for final disposition and to use sparingly unfair labor practice procedures concerning contract-related issues which may occur in the day-to-day administration of this Agreement.

D. 1. Employees who believe they have been illegally discriminated against on the basis of race, color, religion, sex, national origin, age or handicapping condition have the right to raise the matter under the statutory procedure or the negotiated grievance procedure of this Agreement, but not both. Employees shall be deemed to have exercised their right of choice at such time as they timely file a

formal written EEO complaint or file a timely grievance under this procedure.

2. When the employee elects to raise the matter under this negotiated grievance procedure, the grievant shall specify the specific nature of the discrimination (e.g. race, religion), the facts upon which the allegation is based, and the name of the alleged discriminating official.

Section 2: Definitions

The following definitions apply to the terms used in this article:

a. the term "Employer" means the National Office within the Office of Chief Counsel, Internal Revenue Service;

b. the term "Union" means National Treasury Employees Union (NTEU) and/or local chapter 251 of NTEU;

c. the term "employee" means any member of the bargaining unit;

d. the term "grievance" means any complaint:

   1. by an employee concerning any matter relating to the employment of the employee;

   2. by the Union concerning any matter relating to the employment of any employee; or,

   3. by an employee or the Union concerning (i) the effect or interpretation, or a claim of a breach of a collective bargaining agreement or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment.

e. The term "grievance" does not mean a complaint pursuant to 5 USC 7121(c) concerning:

   1. a claimed violation of subchapter II of chapter 70 of title 5 (relating to prohibited political activities);

2. retirement, life insurance, or health insurance;

3. a suspension or removal pursuant to 5 USC 7532, dealing with national security;

4. an examination, certification, or appointment, or,

5. the classification of any position which does not result in the reduction in grade or pay of any employee.

f. The term "days" means calendar days.

Section 3: Grievance Procedure—General

A. This procedure will be the exclusive procedure available for the processing and disposition of grievances, except when the employee has a statutory right of choice, i.e., adverse actions, actions taken for unacceptable performance, or EEO complaints.

B. Grievances under this procedure may be initiated by the employees, the Union, or jointly.

C. Where an employee has initiated a grievance and does not elect to be represented by the Union, the Union will have a right to be present at all discussions between the employee and the Employer concerning the grievance. The Employer will resolve all grievances presented under such circumstances consistent with the terms and conditions of this Agreement. In addition, the steward appointed to represent the organizational segment of the grieving employee will be timely provided with a copy of the Employer's decision resolving the grievance.

D. Employees will have the right to be accompanied, represented, and advised by the authorized representative of the Union as set forth in the steps enumerated below. Union stewards who grieve on their own behalf may select the steward of their choice.

Mass Grievances

E. In the event that two or more employees have designated the Union to serve as their representative on one or more grievances involving substantially the same facts and the same issue (mass grievance), or the Union has filed one or more grievances on behalf of two or more employees involving substantially the same facts and the same issue (mass grievance), the following numbers of grievants may attend:

1. three (3) grievants if the grievance involves more than one (1) but less than twenty (20) employees; and,

2. four (4) grievants if the grievance involves twenty (20) or more employees.

For a mass grievance, there will be one (1) meeting per work unit at Step 1, and only one (1) meeting at succeeding steps, and the numbers described above will control how many may attend.

F. Steps

Step 1:

The Grievance Form (Appendix A) must be filed with the employee's immediate supervisor or manager. A grievance will not be accepted unless filed within twenty-one (21) days after the incident which gave rise to the grievance or within twenty-one (21) days after the grievant became aware of the matter. The grievance will provide information concerning the nature of the grievance and a detailed statement of the specific remedy sought. The grievance will specify the article and section of the Agreement, provision of the statute or regulation or other conditions of employment allegedly violated. The parties may then request a meeting or agree that no meeting be held. If either party requests a meeting, it must take place within seven (7) days of the filing of the Griev-

ance Form. The meeting will be with the immediate supervisor or designee and any other management representative the Employer deems necessary, and the grievant and/or the grievant's steward. A decision will be given to the aggrieved within fourteen (14) days following the filing of the written grievance.

Step 2:

A grievant may appeal the decision in Step 1. The appeal must be in writing and filed with the Division Director (or the appropriate Deputy Associate Chief Counsel in the case of International) within seven (7) days of receiving the decision in Step 1. The parties may request a meeting or agree that no meeting be held. If either party requests a meeting, it must take place within seven (7) days of the appeal. The meeting will be with the person with whom the appeal was filed or designee and any other management representatives the Employer deems necessary, and the grievant and/or the grievant's union steward and/or the Chief Steward. A written decision will be given to the grievant within twenty-one (21) days of the filing of the appeal.

Step 3:

A grievant may appeal the decision in Step 2. The appeal must be in writing and filed with the appropriate Associate Chief Counsel (or Deputy Chief Counsel [Management and Operations] in the case of the Operational Division) within fourteen (14) days of receipt of the decision. The parties may request a meeting or agree that no meeting be held. If either party requests a meeting, it must take place within seven (7) days of the appeal. The meeting will be with the Associate Chief Counsel (or Deputy Chief Counsel [Management and Operations] in the case of the Operations Division) or designee and any

other management representatives the Employer deems necessary and any or all of the following: the grievant, the grievant's union steward, the Chief Steward, the Chapter President or a national representative (if the offices of Chapter President and Chief Steward are held by one individual, this does not authorize an additional union steward at the meeting). The written decision will be given to the grievant within twenty-one (21) days of the appeal. This decision, at the option of the Employer, may be provided by certified mail, return receipt requested, or by hand delivery to the chapter president with a copy to the grievant.

Section 4: *Right to and Notice of Arbitration*

The Union may invoke arbitration. The Union, within twenty-one (21) days of receipt of the decision at Step 3, must notify the final decision maker and Director, Operations Division, of the appeal by certified mail, return receipt requested, or by hand delivery. Pending grievances involving the same issues must be assigned to the same arbitrator.

Section 5: *Miscellaneous*

A. The parties may agree in writing to waive any step of this article.

B. The parties may agree to extend time limits delineated in this article.

C. Time periods set forth in this article will begin the day after the receipt by the Employer of a grievance or appeal and the day after the receipt by the Union of a decision to the grievance or appeal. If the 1st day of any time period falls on a Saturday, Sunday or legal holiday in the District of Columbia, such time period will expire as of the close of business of the next business day.

D. Responses to grievances shall be served on the appropriate steward and the grievant. Time periods set forth in this article shall be computed from the day after the receipt of a grievance or appeal by the Employer and the day after the receipt of a response by the Union.

E. When replying in writing, the Employer will render a substantive response to each issue raised by the Union. Failure to issue a substantive response shall cause no adverse consequences to the Employer.

F. Grievance meetings will be scheduled at a time agreeable to the parties, during the grievant's normal tour of duty.

G. Failure by the grievant or the Union to prosecute the grievance or appeal (including the meeting of time deadlines) at any step of the article will nullify the grievance. Failure by the Employer to meet any of the time deadlines of the article respecting responses will permit the grievant or the Union to move to the next level of grievance or appeal.

H. The parties may not withhold evidence during the resolution of a grievance. Newly-discovered evidence may be introduced at any step of the proceeding prior to arbitration.

I. Unless agreed to by the parties, new issues may not be raised by either party unless they have been raised at Step 1 of the grievance procedure.

J. If the Employer raises an issue of grievability or arbitrability, the grievance will be amended to include a resolution of this issue in the processing of the grievance.

K. No grievances resolved below the level of Associate Chief Counsel will be precedential. Grievances resolved by the Associate Chief Counsel or above will be precedential unless the parties agree otherwise.

ARTICLE 6 ARBITRATION

Section 1

Matters not settled in the grievance procedure or that are otherwise appealable to arbitration will be arbitrated pursuant to the terms of this article.

Section 2

This arbitration procedure will be supported by a permanent panel of arbitrators.

Section 3

A. The Employer and the Union shall mutually select a panel of permanent arbitrators to decide all arbitration cases. Four individuals with federal sector (including equal employment opportunity) arbitration experience will be selected. If the parties cannot reach agreement as to the composition of the panel, each party will nominate five arbitrators and then each party shall strike three, thus leaving four arbitrators.

B. Either party may strike an arbitrator upon giving thirty (30) calendar days notice. In replacing arbitrators or otherwise filling vacancies, the parties will request three names from the Federal Mediation and Conciliation Service (FMCS) for each vacancy. Each party may add two names to the list for each vacancy. They will then alternately strike names from each list until the requisite number of names remain to fill the vacancies. First strike will be determined by a flip of the coin.

C. Upon notification of striking, no additional cases will be assigned to that arbitrator. If an arbitrator has been assigned a case when a party has stricken him or her, the arbitrator shall retain full jurisdiction over that case to include conducting a hearing and rendering a decision.

Section 4

A. Arbitration will be invoked in accordance with the time deadlines (twenty-one (21) calendar days) specified elsewhere in this Agreement.

B. When invoking arbitration, the Union will serve a copy of the invocation on the Chief, Human Resources Branch.

C. Pending grievances involving the same issues must be assigned to the same arbitrator.

Section 5

A. The parties will each pay one half of the regular fees and expenses including travel expenses of the arbitrator hearing a case.

B. Arbitration hearings will be held on the Employer's premises, or at any site mutually agreed to by the parties.

C. The grievant, the grievant's representative, and all bargaining unit employees who are called as witnesses will be excused from duty to the extent necessary to participate in the arbitration proceedings without loss of pay or charge to annual leave.

D. The arbitrator will determine which of the witnesses called by a party may testify at the hearing, based upon a determination that such testimony is irrelevant or unduly repetitious.

E. Except in emergency situations, the arbitrator will not have the authority to keep the record open in order to hear testimony of additional witnesses. Each party has the responsibility and obligation to produce its witnesses on the day of the hearing. For purposes of this article, "emergency" has the same definition it has in 5 USC 7106.

F. The arbitrator shall have the authority to make all arbitrability and/or grievability determinations. The

arbitrator shall make grievability and/or arbitrability determinations before addressing the merits of the original grievance.

G. If the Employer declares a grievance nonarbitrable or nongrievable, the original grievance shall be considered amended to include the issue of nongrievability.

H. The arbitrator's decision shall be final, binding, and precedential, and the arbitrator shall possess the authority to make an aggrieved employee whole to the extent such remedy is not limited by law or the collective bargaining agreement, including the authority to award back pay, reinstatement, retroactive promotion where appropriate, and to issue an order to expunge the record of all references to a disciplinary, adverse, or unacceptable performance action, if appropriate.

I. Upon selection of the arbitrator in a particular case, the respective representatives for the parties will communicate with the arbitrator and each other in order to select a mutually agreeable date for the arbitration hearing. Such selection will be completed within fourteen (14) calendar days of invocation. The parties will schedule the hearing to be conducted as soon as practicable, but no later than ninety (90) calendar days after selection of the arbitrator. Scheduling of a hearing is not tantamount to a waiver of any rights. Once that date has been established, any party that unilaterally requests that an arbitration hearing be postponed, delayed, and/or cancelled for whatever reason, which results in any fees being charged by the arbitrator and/or court reporter, shall pay any and all fees.

J. In any grievance where the parties mutually agree to postpone, delay, and/or cancel an arbitration hear-

ing, the parties will equally share the cost of any fees being charged by the arbitrator and/or court reporter. Where one party has no objection to the request of the other party for postponement, delay, or cancellation of the arbitration hearing, it will not absolve the requesting party from the paying of all the fees being charged.

L. The strict rules of evidence are not applicable and the hearing shall be informal.

M. The parties have the right to present and cross examine witnesses, issue opening and closing statements, and submit posthearing briefs.

N. The arbitrator may exclude testimony or evidence which is determined to be irrelevant or unduly repetitious.

O. Testimony shall be under oath or affirmation.

P. The Employer and the Union agree that the jurisdiction and authority of the chosen arbitrator and opinions expressed will be confined exclusively to the interpretation of the express provision or provisions of this Agreement at issue between the parties. The arbitrator will have no authority to add to, subtract from, alter, amend, or modify any provision of this Agreement, or impose on either the Employer or the Union any limitation or obligation not specifically provided for under the terms of this Agreement. The parties reserve the right to take exceptions to any award to the Federal Labor Relations Authority. Any award may not include the assessment of expenses against either party other than as agreed to in this Agreement.

Q. The arbitrator shall have the obligation of assuring that all necessary facts and considerations are brought before him or her by the representatives of the parties. This may include drawing an appro-

priate inference when either party fails to present facts or witnesses that the arbitrator deems necessary and relevant. However, nothing in this article entitles either party to discovery.

R. The Employer will make bargaining unit employees available as witnesses when requested by the Union. If the Employer determines it is not administratively practicable to comply with the Union's request, and the arbitrator determines the employee's testimony is relevant, then the hearing may be postponed. However, the Union may agree to submit an affidavit in place of the direct testimony of the employee.

S. Bargaining history may not be used in an arbitration hearing unless the party wishing to use it has notified the other in writing at least thirty (30) calendar days before the hearing of its intent to use such testimony and/or affidavits. For purposes of this Agreement, the term "bargaining history" means solely the discussions of the provisions of this Agreement between the National Office of the Office of Chief Counsel, IRS, and NTEU Chapter 251.

T. Unless otherwise agreed, there will be a verbatim transcript of the hearing. A copy of the transcript will be provided to each party promptly after the conclusion of the hearing.

U. Arbitrators will be paid their normal fees, as provided by law.

Section 6

Where one party refuses to attend an arbitration, the arbitrator shall hold the hearing. The first issue to be addressed shall be the question of whether the case is properly before the arbitrator. If the case is proper, the grievance will be heard on the merits. Copies of any transcripts, briefs, and decision will be served on the other party. The party going for-

ward will notify the other party of its intent, listing the date and location of the hearing.

Section 7

In any case where an arbitrator modifies an award pursuant to a request for reconsideration by the Office of Personnel Management, the parties will share equally the additional fees of such reconsideration. In cases where the Office of Personnel Management does not finally prevail, the Employer will assume full responsibility for the additional fees of the arbitrator.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-NG-1447

NATIONAL TREASURY EMPLOYEES UNION

and

DEPARTMENT OF TREASURY
OFFICE OF CHIEF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that copies of the Decision of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

/s/ Evon H. Bumbray
FLRA Docket Clerk

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Dated: December 30, 1987
Washington, D.C.

APPENDIX E

STATUTES INVOLVED

CHAPTER 23—MERIT SYSTEM PRINCIPLES

§ 2302. Prohibited personnel practices

(a) (1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level;

with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include—

(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

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CHAPTER 43—PERFORMANCE APPRAISAL

SUBCHAPTER I—GENERAL PROVISIONS

§ 4301. Definitions

For the purpose of this subchapter—

* * * *

(2) "employee" means an individual employed in or under an agency, but does not include—

(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) an individual in the Foreign Service of the United States;

(C) a physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans' Administration whose pay is fixed under chapter 73 of title 38;

(D) an administrative law judge appointed under section 3105 of this title;

(E) an individual in the Senior Executive Service;

(F) an individual appointed by the President; or

(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; and

(3) "unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

§ 4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the in-

stances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

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CHAPTER 71—LABOR MANAGEMENT RELATIONS

§ 7103. Definitions; application

(a) For the purpose of this chapter—

* * *

(2) "employee" means an individual—

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under

regulations prescribed by the Federal Labor Relations Authority;

but does not include—

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the United States International Development Corporation Agency, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

* * * * *

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

* * * * *

SUBCHAPTER III—GRIEVANCES, APPEALS, AND REVIEW

§ 7121. Grievance procedures

(a) (1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employees in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance in the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e) (1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance pro-

cedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date of such award, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5996 of this title).

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

* * * * *

CHAPTER 75—ADVERSE ACTIONS

SUBCHAPTER I—SUSPENSION FOR 14 DAYS OR LESS

§ 7501. Definitions

For the purposes of this subchapter—

(1) "employee" means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less[.]

§ 7502. Actions covered

This subchapter applies to a suspension for 14 days or less, but does not apply to a suspension under section 7521 or 7532 of this title or any action initiated under section 1206 of this title.

§ 7503. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report

of four such instances within any one-year period or any other pattern of discourteous conduct).

(b) An employee against whom a suspension for 14 days or less is proposed is entitled to—

(1) an advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order effecting the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

§ 7511. Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment

under other than a temporary appointment limited to 1 year or less; and

(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

* * * * *

(b) This subchapter does not apply to an employee—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.

§ 7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

§ 7513. Cause and Procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

* * * * *

CHAPTER 77—APPEALS

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee

of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a) (1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

* * * * *

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a) (1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision

of the Merit Systems Protection Board may obtain judicial review of the order or decision.

* * * * *

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an absue of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.